BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL R. LUST Claimant	)	
VS.	)	
BRUCE RING PAINTING Respondent	)	Docket No. 1,015,463
AND	)	
WESTERN AGRICULTURAL INS. CO. Insurance Carrier	)	

ORDER

Claimant requested review of the October 11, 2005 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on February 1, 2006.

APPEARANCES

William G. Manson, of Kansas City, Missouri, appeared for the claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that claimant's accident caused a temporary aggravation of his preexisting low back condition but no additional permanent impairment. He therefore found claimant was entitled to medical treatment and eight and three/fourths weeks of temporary total disability compensation at the rate of $400.02 per week for a total of $3,360.17 but no permanent partial disability compensation.

The only issue raised for the Board's review is the nature and extent of claimant's disability. Claimant argues the ALJ erred in denying him permanent partial disability compensation. Claimant states that Dr. J. Michael Smith rated his functional disability from the accident at 5 percent to the body as a whole. This was in addition to his preexisting impairment. Furthermore, due to his permanent restrictions, claimant also asserts he is entitled to a work disability of 50 1/2 percent or 66 1/2 percent based on a 81 percent task loss assessed by Dr. Smith and a wage loss of either 20 percent or 52 percent.

Respondent argues the Award of the ALJ should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a painter. On June 6, 2003, he was working in Overland Park, Kansas, in a new-construction residence. As he was spraying lacquer on cabinets, he had to step on a bucket in order to get to the top of the cabinet. When he stepped off the bucket, the bucket moved and he lost his balance and came off the bucket hard. He testified he felt pain shoot through his low back. The pain went down the left side of his back and into his left thigh.

Claimant told respondent's owner, Bruce Ring, about the incident and Mr. Ring told him to take the rest of the day off and see what happened. Claimant remained at home for three or four days. He put heat on his back and took muscle relaxers. Because claimant's symptoms did not resolve, about a week after the accident Mr. Ring referred claimant to Dr. Holly Kauffman. Dr. Kauffman examined claimant and ordered an MRI. Dr. Kauffman then referred claimant to Dr. Robert Beatty, a neurologist. Dr. Beatty told claimant he had a bulging disk at L4-L5 but that he was not a candidate for surgery. Dr. Beatty set him up for physical therapy and epidural injections. Claimant received physical therapy at Menorah Medical Center and received two epidurals from Dr. Howard Aks. Claimant stated that after receiving the epidurals, he felt fine with no pain. When he went in for a third, he did not get an injection, but Dr. Aks told him to come back if he started having pain. He was released to return to work with no restrictions in late September 2003 by Dr. Beatty. Claimant went back to work for respondent doing the same job he did before the injury with no accommodations. Claimant testified he started having pain a couple of weeks after he started back to work but never asked to go back to Dr. Aks or Dr. Beatty.

Between the time he returned to work in September 2003 and his termination in February 2004, claimant admits he painted every working day, but testified he was in pain. His work as a painter required him to do a lot of lifting and carrying. The heaviest object

he had to move was a spray rig, which weighed between 60-65 pounds. He also did a lot of bending and stooping with the job. In February 2004, Mr. Ring told him he could not afford to keep him on. When claimant offered to take a cut in pay, Mr. Ring told him that he was afraid to keep him around since he had been hurt.

At the time of the accident, claimant was making $15 an hour and was working 40 or more hours a week. After his termination, claimant collected unemployment compensation and looked for work. He said that when he told a prospective employer about his back injuries and his limitations, he was told they did not have a position for him. Since May 2004, claimant has been working part time for his fiancée, who owns a company called Brushed by an Angel. He does estimating, picking up and delivering, and helps with clean up. He does not help with the painting and does not do any lifting when picking up supplies or making deliveries. He earns $12 an hour and works from one to three days a week.

Claimant had two major back injuries before the June 2003 accident. The first occurred in 1986 when he injured his low back at the L5-S1 level. Claimant stated that the pain went down his right leg. Claimant was treated at Kansas University Medical Center, and Dr. Ray Jacobs performed surgery on his back. Claimant stated he had a full recovery and that Dr. Jacobs did not give him any restrictions regarding lifting, bending or stooping.

Claimant had a second accident and low back injury in 1993 while sledding down a hill. At that time, the pain went down his left leg. Dr. Steven Wilkerson, a board certified neurosurgeon, performed surgery at the L5-S1 level . Claimant stated he again made a full recovery and was given no permanent restrictions.

Dr. Wilkerson testified that he placed a 20-pound lifting restriction on claimant on June 4, 1993, when claimant was discharged from the hospital after surgery, but that this was a temporary restriction. Dr. Wilkerson last saw claimant on August 16, 1993, at which time claimant was still experiencing pain symptoms with activity and some loss of reflexes on examination. Nevertheless, he told claimant he did not need to return. He did not place any written permanent restrictions on claimant at that time and had no independent recollection of telling him that he had any lifting restrictions.

Claimant said that after his prior surgeries and before the accident in June 2003, he was able to return to heavy manual labor. During this time, he did not seek medical treatment for his back. He did not have to have help doing his work. If he picked up something heavy, he might be sore for a day or so but would take Tylenol and the pain and stiffness would be gone. Claimant states that he now has constant pain which does not go away. He denies having any intervening accident. The pain is in his low back and radiates down his left leg. He is stiff and can hardly bend over. However, he has not sought any medical care since he last saw Dr. Beatty in September 2003.

Angel Julian is claimant's fiancée and owns Brushed by an Angel. She thought claimant started working for her around May 22, 2004. Some weeks claimant does not work at all and sometimes it is just a day or two a week. Ms. Julian stated that when she gets paid for a job, she pays her other two employees, and what is left goes home. She has a common bank account with claimant, and any proceeds from painting jobs goes into that common bank account. Claimant does not fill out a time sheet. Ms. Julian does not issue a paycheck to claimant. She testified that if she broke it down, claimant would earn about $12 an hour and she would make about $18 per hour. She also testified about the extent to which claimant has limited his activities since the accident. Although he obtained temporary relief from the epidurals, within a month or two after returning to work for respondent he would come home from work in pain. He stopped doing many of the things he used to do like mowing the yard, shoveling snow and working on their cars. She said that it really bothers claimant that he cannot do those things and be active like he was before the accident.

Dr. J. Michael Smith is a member of the American Academy of Disability Evaluating Physicians. He examined claimant at the request of claimant's attorney on August 17, 2004. He reviewed the medical records relating to claimant's current treatment and his preexisting injuries. He noted that the MRI showed "a moderate diffuse disc bulging at L4-L5 with more focal component encroaching on the L5 nerve root centrally and moderate disc space narrowing at L5-S1."[1] Upon examination, Dr. Smith found that claimant had a normal gait. His heel and toe walking was normal. His squat was full, and pelvis was level. There was an absence of lumbar lordosis indicating either spasm or prior injury. Tenderness was present in the midline at L4-5. His anterior flexion was 70 degrees, extension was 5 degrees, and lateral flexion was 30 degrees bilaterally. His motor strength in the lower extremity was normal, and there was no sensory deficit. Straight leg raising was negative, deep tendon reflexes are 1+ at the patellar level and absent bilaterally at the Achilles' level. There was no atrophy of the thigh, but there was 2 centimeters of atrophy of the left calf. Dr. Smith had no indication that claimant was exaggerating or magnifying his symptoms.

Dr. Smith diagnosed claimant as having a relatively severe strain to his lumbosacral spine, a soft tissue injury, with pain into his left thigh. Dr. Smith said there was no objective sign of radiculopathy and that the MRI did not show definite evidence of nerve root compression. He admitted he did not review the films of the MRI but relied on the impression of the radiologist. He noted loss of motion on claimant but could not attribute it to this injury as opposed to the past injuries. Dr. Smith opined, using the AMA *Guides*,[2] that claimant had an 11 percent impairment to the body as a whole related to his

---

[1]Smith Depo., Ex. 2 at 3-4.

[2]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

preexisting injuries, 10 percent due to the injury in 1986 and 1 percent to the injury of 1993. As for the injury of June 2003, Dr. Smith testified claimant had an additional 5 percent impairment to the body as a whole as an aggravation of preexisting injury.

After he examined claimant, Dr. Smith recommended claimant limit lifting or carrying to 10 pounds on a frequent or occasional basis and squatting, bending, kneeling, climbing, or reaching to no more than occasionally. He made these recommendations after visiting with claimant but without having a functional capacity evaluation. Dr. Smith acknowledged that claimant should have had some of these restrictions as a result of the preexisting injuries.

Dr. Smith reviewed the task list prepared by Michael Dreiling, which contained 11 tasks. Of those 11 tasks, Dr. Smith opined that claimant could no longer perform 9 for a task loss of 81 percent.

Michael Poppa, D.O., is board certified in occupational medicine. He examined claimant at the request of respondent's attorney on December 7, 2004. Dr. Poppa diagnosed claimant as having a resolved soft tissue lumbar strain superimposed upon a preexisting post lumbar laminectomy/diskectomy with associated degenerative disc bulging, facet disease and spondylosis. Dr. Poppa believed that claimant had sustained a temporary exacerbation of his lower back condition as a result of his accident on June 6, 2003, and at the time of the examination had reached maximum medical improvement. Dr. Poppa opined that claimant had no additional impairment involving his lumbar spine as a result of his injury of June 6, 2003. Dr. Poppa stated that claimant should have had permanent restrictions from his preexisting condition following his previous injuries but that he was still capable of performing the work he was doing before his June 6, 2003, injury.

Michael Dreiling visited with claimant at the request of claimant's attorney on July 28, 2004. He reviewed with claimant his job tasks for claimant's work history for the 15 years before the June 2003 injury and came up with a task list including 11 tasks. Mr. Dreiling also indicated that claimant had a 20 percent wage loss, as his wage while working for respondent was $15 per hour and he now earns $12 working for his fiancée. However, he testified that his notes indicate that at that time claimant said he was working 35 hours per week, as opposed to having worked 40 hours per week for respondent, which would increase his percentage of wage loss. Mr. Dreiling did not do any vocational testing, did not do any labor market survey and did not provide any job placement services for claimant. He did no independent investigation as to what claimant's job tasks were but listed them after visiting only with claimant.

Although this case presents a close question, the ALJ was not persuaded that claimant suffers from constant debilitating pain, and neither is the Board. Claimant reported to Dr. Beatty and Dr. Aks that he was symptom free in September 2003. Claimant returned to an unaccommodated job with respondent and continued to paint and do all his former work tasks for approximately five months before he was laid off. It is troubling that

the reason respondent gave for terminating claimant was that he had been injured. Apparently, respondent was concerned about claimant either reinjuring himself or not being able to continue doing his job. But claimant said he wanted to continue working for respondent. He never asked for accommodations, nor did he ask for additional medical treatment. It appears that claimant would still be working for respondent if he had not been terminated. This contradicts claimant's assertions that he can no longer paint or perform other physical activities like lifting, bending and stooping. Furthermore, when claimant was asked if the painting he did for his fiancée caused his symptoms to worsen, he said no, his symptoms stayed the same.

> Q. So when did you stop actually doing painting for Brushed by an Angel?
>
> A. Probably a month after I started.
>
> Q. The painting you did in that first month for Brushed by an Angel, did that make your back worse?
>
> A It didn't make it worse. It was the same pain that I had been experiencing.
>
> Q. Okay. Just so I understand. The pain was no worse when you were painting, but you just stopped painting?
>
> A. Yes.[3]

Although claimant did not have permanent restrictions before his June 2003 injury, the doctors seem to be in agreement that permanent restrictions would have been appropriate following his first two back injuries and surgeries. The restrictions he has now would have likewise been appropriate before the June 2003 accident. Accordingly, the Board agrees with the ALJ's conclusion that clamant's condition has not been made permanently worse by the June 6, 2003 accident.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated October 11, 2005, is affirmed.

IT IS SO ORDERED.

---

[3]R.H. Trans. at 59.

Dated this _____ day of February, 2006.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: William G. Manson, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director